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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1958

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari issue to review the mootness judgment of the aforesaid court entered January 24, 1958, in this case, numbered 15,765 below.

OPINION BELOW.

The opinion of the aforesaid court (Appendix B-1) is reported in *251 F. 2d 512.* In it the court found that the meeting of the stockholders of intervenor-respondent Union Electric Company (hereinafter called "Union"), scheduled

for April 20, 1957, had been held that day. In its judgment (Appendix B-2) the court "dismissed as having become moot" petitioners' March 29, 1957, petition to review the March 21, 1957 order of respondent Securities and Exchange Commission (hereinafter called "SEC"), which order (Appendix A-2) sanctioned the proxy material Union used in connection with that stockholders' meeting.

JURISDICTION.

The judgment was entered January 24, 1958. Rehearing was denied February 25, 1958. Jurisdiction is invoked under *28 U.S.C. 1254 (1)*.

QUESTION PRESENTED.

Whether a petition for review of an SEC order, permitting to become effective a declaration of proxy material, becomes moot after the holding of the stockholders' meeting in connection with which the SEC sanctioning order is issued.

STATUTE INVOLVED.

Sec. 24 (a) of the Public Utility Holding Company Act of 1935, *15 USC 79x*. It is set forth in Appendix A-1.

STATEMENT.[1]

PART I.

This case arose out of a controversy respecting false advertising. The false advertising that started the controversy was a full-page newspaper ad covering the atomic-

[1] This is not a Statement of the entire case. It is a Statement of only that part of the case that is essential to consideration of the mootness question presented. Since the case here involves two administrative proceedings, and two judicial proceedings resulting therefrom, the Statement is in four parts.

reactor program of the private power industry, in which ad Union, a Missouri corporation, participated, and which was published in 37 newspapers, from coast to coast, on June 13, 1956. It was found false, after a hearing, by the full House Appropriations Committee of the 85th Congress, First Session. See Exhibit 13.[2] Hon. Clarence Cannon, Chairman of that Committee, said of this case, on February 4, 1957 (Pr. Rec. 81):

> "You have touched on one of the crying needs of the time—'Truth-in-Advertising'. Vast sums of money are being spent to mislead the American people."

Petitioner Nancy Corinne Dyer, a student at Bryn Mawr College, owned 100 shares of Union's common stock. She had her father, a lawyer, protest to Union its participation in that false ad. He did, on June 28, 1956 (Item 7,

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[2] Under the July 10, 1957, order of the court the case was heard below on the original record, without need to print. See Item 13 of the Designation of Record filed with the record herein. However, for the convenience of the court below petitioners filed a printed compilation of "Pertinent Portions of Respondent's Record on Review, being Part of Intervenor's Declaration, Part of Petitioner's Objections, Respondent's Findings and Opinion, the Order on Review, Pertinent Portions of the Evidence Adduced, in Narrative Form, and Statement Regarding Petitioners' Supplementary Record". Hereafter, that will be referred to as the "Pr. Rec."

Because they were so voluminous, and extensive, none of the exhibits were reproduced in the Pr. Rec. Hence, they are referred to by document number, i. e., "Doc. ....", as designated in the SEC's Transcript of Record, which is in turn referred to in the Designation of Record filed herein as Item 7 thereof. References herein are to that Designation of Record, which covers the record filed herewith. Thus, Exhibit 13 is "Item 7, Doc. 31; see Pr. Rec. 80". When the word "Item" is used it refers to the particular item of the Designation of Record filed with the record herein.

All statements made herein are supported by the record, though reference is not always made to the particular substantiating portion. If that were done this Statement would be less concise than it is. For example, reference to the portion of the record substantiating the statement respecting the start of this controversy would have to be "Exhibits 7 and 9, Item 7, Docs. 28 and 30; see Pr. Rec. 93". Reference to the atomic-reactor ad would be "Item 7, Doc. 2; see Pr. Rec. 93".

Doc. 28). Union sought to justify the ad (Item 7, Doc. 30). Thus the controversy started.

Then, in November of 1956, an unsavory news story broke. Union's management, it seems, had engaged in questionable lobbying activities over in Illinois, in 1955, in conjunction with Orville E. Hodge, then State Auditor of Illinois (Item 7, Doc. 15, p. 1). At least the U. S. Department of Justice subsequently found the lobbying "of questionable legitimacy" (Item 37; Pr. Rec. 106). Hodge had been sent to the penitentiary (Item 7, Doc. 15, p. 1). Union's management was on the spot. For the $35,000, it had paid for the lobbying had wound up with Hodge (Item 37; Pr. Rec. 106).

Union's president, J. Wesley McAfee, then made a report to Union's board of directors respecting the lobbying venture (Item 7, Doc. 39). That was on November 16, 1956. The board expressed its confidence in Mr. McAfee, accepted his "report", ordered it released to the press, ordered it inserted as a paid ad in the St. Louis Globe-Democrat and the St. Louis Post-Dispatch, and ordered it sent to the stockholders (Id.) All that was done.

Miss Dyer considered the "report" false and deceptive, and again had her father protest, He did, to Mr. McAfee, pointing out numerous instances of deception, trickery and falseness (Item 7, Doc. 26). He sent copies to the SEC and the Federal Trade Commission. That was on November 23, 1956.

Union took the position that Miss Dyer, being a minor, did not have the legal capacity to operate through an attorney. It ignored her father's protest. So Miss Dyer, herself, on December 31, 1956, submitted to Mr. McAfee 3 proposals for stockholder action at the next stockholders' meeting, April 20, 1957 (Item 7, Doc. 5, Ex. 10). One of these was a proposed By-Law banning false advertising and false communications to stockholders (Pr. Rec. 11).

In support, she cited Sec. 45 (a) of the Federal Trade Comsion Act, *15 USC 45 (a)*, which provides that "unfair or deceptive acts or practices in commerce, are declared unlawful."

There is likewise a statute in Missouri, *R. S. Mo. 1949, Sec. 561.660*, which renders the publication of untrue, misleading or deceptive advertising unlawful, and provides a penalty. However, it covers only advertisements related to "what defendant wished to sell", not "what he wished to buy". See *State v. Carruthers (St. L. Ct. App. 1929), 21 S. W. 2d 894*, which is the only Missouri case on that statute. Because of that, Miss Dyer concluded that it did not cover Union's false ads and false communications to its stockholders, designed not to sell its products, but to buy good will, and proxies, for its management.

Hence, she felt a prohibiting By-Law necessary. It would cover the matter, she reasoned, under the common law principles announced in *Abrams v. Textile Realty Co. (1949) 97 NYS 2d 492.* In Missouri, a corporation that violates its By-Laws acts ultra vires. Injunctions could be had by stockholders if Union had a By-Law banning false advertising. The By-Law would act as a real deterrent, since expenses and counsel fees could be allowed (Id.).

Miss Dyer's By-Law ban was rejected by Union, who put it up to the SEC. So she wrote SEC Chairman J. Sinclair Armstrong, protesting (Item 7, Doc. 33). That was on January 28, 1957. The SEC sided with Union, as will be shown.

Under *R. S. Mo. 1949, Sec. 351.290*, the power to make By-Laws is vested in the stockholders. The statute provides that "The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation". Union's articles of incorporation did not preclude the adoption of such a By-Law, and the "law"

referred to in the statute is Missouri law, not SEC law. *R. S. Mo. 1949, Sec. 351.385 (11).*

Miss Dyer was not only against false advertising. She was also "against the use of improper influence in the securance of legislation." She so testified before the Joint Committee on Atomic Energy, 85th Congress, First Session, on February 28, 1957 (Item 7, Doc. 15, p. 20). She also there testified:

> "I believe that corporate managements should be truthful in their correspondence with the stockholders. I am against chicanery and deceit in corporate advertising, whether of the corporation's products or of the integrity and general superiority of its management . . . Every stockholder has a responsibility for the policy of his company, and I am assuming mine."

She did. But she was handicapped, being a minor. She could not act through an attorney. On December 17, 1956, she had brought a lawsuit against Union, in the St. Louis Circuit Court, to test that out, and lost (Item 7, Doc. 34). She took an appeal,[3] but in the meanwhile, as she wrote SEC Chairman Armstrong, she was kept too busy in college, studying, to fully assume her responsibilities as a stockholder. So her father, petitioner J. Raymond Dyer, long one of Union's consumers, on January 11, 1957, bought 250 shares of Union's common stock in his own name (Pr. Rec. 15). That enabled him to carry on with his daughter.

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[3] *State ex rel. Nancy Corinne Dyer v. Union Electric Co. et al. (St. L. App., Feb. 4, 1958), 309 S. W. 2d 649.* Since the record showed she had reached her majority while the case was on appeal relator moved for rehearing, suggesting mootness under *Atherton Mills v. Johnson (1922), 259 U. S. 13,* theretofore followed in Missouri. However, rehearing was denied, March 1, 1958. So relator applied to the Supreme Court of Missouri to accept transfer (a proceeding comparable to certiorari under Missouri Supreme Court Rule 2.06). Her application (Case No. 46,893) was denied April 14, 1958. Mootness in Missouri is a very flexible rule.

Together, petitioners submitted 10 more proposals to Union under SEC Proxy Rule X-14A-8, for stockholder action at the April 29, 1957 stockholders' meeting. See Appendix of petitioners' brief below (Item 15) for all Proxy Rules referred to herein. One proposal was a resolution banning false advertising similar to Miss Dyer's previously proposed By-Law ban. Resolutions, under Missouri law, require only the vote of a majority of the quorum. *R. S. Mo. 1949, Sec. 351.265.* Under Union's By-Law IX (Item 7, Doc. 20), which petitioners contended is illegal, the enactment of By-Laws requires the vote of a majority of all the stock outstanding.

Union excluded petitioners' two false advertising proposals from its proxy statement and proxy ballot, along with three of petitioners' other proposals. It referred in its Notice of Meeting to the resolution banning false advertising as a resolution "relating to company advertising and communications to stockholders" (Pr. Rec. 2).

A hearing was had before an SEC Hearing Examiner, March 13-15, 1957. Mr. McAfee testified that his lobbying "report" was "for all substantial purposes an accurate one" (Item 7, Doc. 16, p. 105), and was "substantially correct" (Id., p. 110). That testimony covered the "report" as released to the press, the "report" as carried as paid ads, and the entire communication respecting it as sent to the stockholders.

The "report" that had been released to the press on November 16, 1956, and published verbatim in the St. Louis Globe-Democrat, was Petitioners' Exhibit 11, excluded from evidence (Pr. Rec. 93). Another version, carried as a two-page ad in both St. Louis newspapers on November 18, 1956 (Exhibits 2 and 3), was admitted in evidence (Item 7, Docs. 24 and 25), as was Exhibit 4 (Item 7, Doc. 2), which was the "report" as mailed by Mr. McAfee to the stockholders on November 19, 1956, together with a

reprint of a November 17, 1956 editorial of the St. Louis Globe-Democrat entitled "The Union Electric Co. Situation", and his transmittal letter stating that the Globe editorial "states the case clearly". The Post-Dispatch editorial, of November 18, 1956, was diametrically opposite. It was entitled "Shady Business" (Item 7, Doc. 36). Mr. McAfee did not send that editorial to the stockholders.

Petitioners contended at the SEC hearing that Mr. McAfee's "report" was false, and offered in evidence their Exhibit 21, a press clipping from the front page of the November 23, 1956, edition of the St. Louis Post-Dispatch, headed "BAR'S OK FALSELY CLAIMED FOR UNION ELECTRIC'S BILL." As to it, Mr. McAfee testified (Item 7, Doc. 16, p. 120; Pr. Rec. 55): "I never saw headlines that were less informative, or accurate, than those were. The body of the story was quite accurate." The body of the story recited that the lobbied bill had *not* been approved by the Illinois Bar Association or the Chicago Bar Association. Exhibits 6 and 22 (Item 7, Docs. 27 and 35), being letters from both Associations to Mr. Dyer, bore that out. But Exhibit 21, which went into considerable detail, was excluded from evidence on the ground that it was hearsay, and not binding on Union (Pr. Rec. 96), despite the fact that Mr. McAfee had vouched for the accuracy of the "body" of it.

Though his "report" very plainly speaks for itself, Mr. McAfee insisted that he did not say in it that the 1955 bill (the bill that had been lobbied) had the support of "the Chicago Association, or any other association" (Pr. Rec. 55). He insisted that what he had referred to in his "report" was a 1953 bill, which had been amended in the 1955 bill by adding Amendment 28A. However, in the "report" itself he stated (Item 7, Doc. 2, Ex. 1, p. 2): "It is, I believe, important to note that the proposed amendment had the approval of several important groups.

These included the Illinois Commerce Commission and the Illinois and Chicago Bar Associations."

The Globe editorial that Mr. McAfee sent the stockholders along with his "report," stating it "states the case clearly", and the truth of which he vouched for (Item 7, Doc. 16, pgs. 105, 110), recited: "The law had the approval of the Illinois Commerce Commission and the Illinois and Chicago Bar Associations". The reference to the 1955 bill was clear. And Mr. McAfee testified (Item 7, Doc. 16, p. 131), likewise clearly referring to the 1955 bill:

> "I think it had the approval of the Bar, and everyone else. No one, Mr. Dyer, except four people in the Senate, made one word of objection to the bill that I ever heard of from that day to this".

Union's counsel, however, stated (Item 7, Doc. 16, p. 363; Pr. Rec. 87): "I will admit that a bill has been introduced in the current session of the Illinois legislature to repeal the Act that was passed in 1955".

Mr. McAfee also testified (Item 7, Doc. 16, p. 129): "I think all will agree those who were directly concerned with it, and studied it of the bar, were in favor of it. At least they didn't appear and oppose it". And (Id., p. 127): "I think that part of the bar who studied either section, if it applied directly to them, approved it. And I know the Commission approved it, so I think the statement is perfectly true".

Exhibit 21 quotes the April, 1955, minutes of the Public Utility Committee of the Chicago Bar Association, which minutes show the extent and character of the opposition. The bill was rejected by the Committee on the ground that it involved "unfair discrimination"; would "result in undue burden on interstate commerce"; imposed "burden on foreign corporations now exempt from capital stock tax requirements"; created "a dangerous precedent"; and was

"subject to attacks on constitutionality". The Committee rejected the plea of Mr. Henry Driemeyer, Union's Illinois counsel, that it approve the bill. One member of the Committee, Mr. James J. Danaher, Assistant Corporation Counsel for the City of Chicago and former member of the Illinois Commerce Commission, considered the bill, according to Exhibit 21, as a private bill presented in the guise of a public measure, which "didn't seem right" to him.

In his November 19, 1956, letter transmitting his "report" to the stockholders Mr. McAfee said (Item 7, Doc. 2):

> "I want to make it clear to you that there has been no adverse comment concerning the merits of the legislation involved. The fact is that this legislation is definitely in the public interest as is explained in the attached report which I made on Friday to the Board of Directors".

Under Proxy Rule X-14A-9, if false or misleading communications to stockholders constitute solicitations, they must be rectified. Petitioners contended at the SEC hearing (Pr. Rec. 58) that the McAfee "report" constituted solicitation material under Proxy Rule X-14A-1. Union's counsel denied that, and Mr. McAfee, who was on the stand, interposed (Item 7, Doc. 16, p. 153; Pr. Rec. 58):

> "And which I am delighted to deny under oath. There was no thought, no one had any desire to seek proxies in November. There was no thought of the annual meeting".

Since Mr. McAfee's denial of intent was hearsay as to all members of the board other than himself, petitioners requested the SEC, if it considered intent controlling under Proxy Rule X-14A-1 (and petitioners contended that intent was no criterion of solicitation under that Rule) to sub-

poena the other directors (Item 7, Doc. 15, pgs. 21, 22). However, petitioners' request was denied.

Petitioners also contended at the hearing that the proxy ballots Union's management proposed to use, under which management-appointed proxy agents could vote against all but one of petitioners' proposals, even though the stockholders executing them did not affirmatively direct that their ballots be so cast, were illegal (Pr. Rec. 68). Union contended that Proxy Rule X-14A-4 (b) sanctioned such "ghost-vote" proxy ballots. Petitioners contended that that Rule was unauthorized by the Act, since contrary to the public interest and the interest of investors and consumers.

Petitioners further contended that their 5 excluded proposals were unlawfully excluded, and that management's Notice of Meeting was deceptive and unlawful under Missouri law.

Because the points involved were numerous, and particularly because of the exclusion from evidence of their Exhibits 11 and 21, petitioners asked for oral argument before the Commission. It was denied them (Pr. Rec. 103). They were given from Friday night until noon Wednesday to file a printed brief (Id.). Under Rule IX (f) of the Rules of Practice of the SEC briefs are due 5 days after the transcript is filed, which event did not occur until the Monday. However, with the help of their New York counsel petitioners got their brief in on time (Item 7, Doc. 14).

The SEC, in its order entered the next day, March 21, 1957 (Pr. Rec. 42-44), permitted Union's declaration of proxy material to become effective as filed. In its Findings and Opinion (Pr. Rec. 26-44), issued 27 days later, April 17, 1957, three days before the scheduled stockholders' meeting, the SEC overruled all of petitioners' objections, reciting reasons in some instances, but none in others. It recited none for the exclusion from the proxy statement and proxy

ballot of Miss Dyer's proposed By-Law banning false advertising, but cited Proxy Rule X-14A-8 (c) (5) as the basis for the exclusion of the similar resolution (Pr. Rec. 36). It cited Proxy Rule X-14A-4 as the basis of its approval of the form of "ghost-vote" proxy ballot Union proposed to use (Pr. Rec. 38) and found "no basis to require any change in the notice of meeting" (Pr. Rec. 34). It likewise found (Pr. Rec. 40) no error in the Examiner's rulings excluding Exhibits 11 and 21.

As to Mr. McAfee's "report," the SEC specifically held that the stockholder communications and ads in question (Item 7, Docs. 2, 24, 25) did not "fall within the category of soliciting material" (Pr. Rec. 33), adding in a footnote:

> "Of course, we are not passing on the accuracy of the explanation made by the president of Union."

As to Mr. McAfee's denial of intent, the SEC found (Pr. Rec. 33):

> "At the time the statement was published in the newspaper and sent to Union's stockholders there was no proxy solicitation under way and no contest was anticipated in connection with the annual stockholders' meeting for 1957."

Yet Mr. Dyer had testified (Item 7, Doc. 16, p. 160; Pr. Rec. 91) that on November 16, 1956, before the meeting of Union's board on that day, he had gone to Union's offices and sought "permission to attend the meeting of the board," but that Mr. McAfee had sent word back to him that that was "impossible." Mr. Dyer had further stated (Item 7, Doc. 16, p. 200) that he had "tried to get into" the board meeting to protest Mr. McAfee's report before it was "even submitted to the board of directors." Mr. McAfee had admitted that, admitted that Mr. Dyer had written him about it, and that he had written back (Id.). Mr. McAfee's letter, Exhibit 1 (Item 7, Doc. 23; Pr. Rec. 99), refers to Mr. Dyer's efforts, and to the fact that he

was "threatening to bring a claim against the company." The claim was the original claim, that Union was engaging in false advertising (Item 7, Docs. 28, 30). Mr. AcAfee admitted that that was the claim (Item 7, Doc. 16, p. 200).

Nonetheless, and despite his admissions respecting Mr. Dyer's November 16, 1956 protest efforts, Mr. McAfee, referring to the mailing of his "report" to the stockholders on November 19, 1956, testified (Item 7, Doc. 16, p. 200): "At the time it was sent out no one had appeared in opposition, Mr. Dyer or anyone else . . . ." And further (Id., p. 202): "We certainly did not have it in mind when we sent the stuff out. Whether it was one hour, when the stuff was gone, we didn't have any demand you were anticipating some time after."

To which Mr. Dyer had replied (Id.): "If you permitted me to attend the directors' meeting, I would have advised you these statements were incorrect and misleading.[4]

PART II.

On March 29, 1957, petitioners filed in the court below, as Case No. 15,765, their verified petition to review the SEC'S March 21, 1957, order. They mailed a copy to the SEC

[4] All the foregoing Part I has been considered necessary to show the importance of this case, and what is really involved. An erroneous dismissal for mootness, in an unimportant case, constitutes no basis for certiorari. But Union is a $525 million corporation. Its president is president of Edison Electric Institute and the recognized leader of the private power industry. Union serves some 650,000 consumers, has some 10,890,482 shares of stock outstanding, held by some 61,000 stockholders of record, plus some 11,000 more who are beneficial owners. They reside all over the world. Considering that, and the issues raised, it is believed that this case has public interest. And where public interest exists an exception is made in the law of mootness. See 1941 Annotation *"Public Interest as Ground for Refusal to Dismiss on Appeal where Question has Become Moot", 132 A. L. R. 1185;* S. A. Diamond, *"Federal Jurisdiction to Decide Moot Cases" (1946), 94 Pa. L.R. 125; "Administrative Law—Questions 'Moot' on Appeal" (1947), 22 Ind. L.J. 235;* and *"Cases in Equity that Become Moot on Appeal" (1921), 34 H.L.R. 416.*

that day. In their petition (Item 1, para. 6) petitioners alleged that the SEC, "contrary to the interest of petitioners and the public interest and the interest of investors and consumers," had issued its March 21, 1957, order in advance of its Findings and Opinion, "solely as an accommodation to the management of said company," induced by its "bias and prejudice in favor of said management and against petitioners and said company's consumers and stockholders."

Jurisdiction of the court below was invoked under Sec. 24 (a) of the Act, which also specifically authorizes this certiorari proceeding. Reversal of the mootness ruling below is sought since that ruling involves jurisdiction under Art. III, Sec. 2 of the Constitution.

Union came in as an intervenor-respondent on April 8, 1957 (Item 3). On that day the SEC filed its motion to dismiss the petition for review (Item 5), alleging that petitioners were not "persons aggrieved" under the Act; that their petition for review was "frivolous and filed solely for delay"; and that it contained "impertinent and scandalous allegations unsupported by the record."

Petitioners' application for a stay (Item 2), filed with the petition for review, was argued April 8, 1957 (Item 4), and denied the next day (Item 6). The SEC did not file its transcript of the record (Item 7, Vols. I and II) until May 6, 1957. Sec. 24 (a) of the Act provides that as soon as the petition for review is served the SEC shall "thereupon" file the transcript.

Then followed extended proceedings (Items 8-13) in which petitioners sought to achieve completion of the record. Exhibits 11 and 21 (and some other exhibits) were not included. Mr. McAfee's "report" as sent to the stockholders (Item 7, Doc. 2) differed in six very material respects from his "report" as released to the press, Exhibit

11. Yet under the minutes of the meeting of Union's board on November 16, 1956 (Item 7, Doc. 39), there was only one "report" which the board had ordered released to the press and sent to the stockholders. By cunning trickery the "report" as sent to the stockholders had been rendered even more exculpatory than the "report" as released to the press. The "report" as sent to the stockholders had obviously been rewritten in the light of the very commendatory Globe editorial which Mr. McAfee had sent the stockholders, along with the second version of his "report," the truth of which editorial he had vouched for at the hearing (Item 7, Doc. 16, pp. 105, 110).

Mr. Dyer had testified at the SEC hearing (Item 7, Doc. 16, p. 161; Pr. Rec. 91) that on December 28, 1956, his daughter, in his presence, had been permitted by Union's Secretary to examine the minutes of the November 16, 1956, board meeting; that he had examined those minutes with her, as her "assistant"; that he had gone through them with a "fine tooth comb," and had made a copy in pencil "of the relevant portions." They "did not reflect what transpired at the meeting," Mr. Dyer testified (Id.; Pr. Rec. 92). Hence, he characterized them as "phony" (Item 7, Doc. 16, p. 154; Pr. Rec. 58). They differed, Mr. Dyer stated, from the minutes Union produced at the hearing (Item 7, Doc. 39).

Finally, on September 25, 1957, after the extended proceedings above referred to, the SEC filed the missing exhibits. Exhibit 11 is in Vol. III of Item 7, as Doc. 41. Exhibit 21, the "body" of which Mr. McAfee testified was "quite accurate", but which completely refutes his testimony that his "report" was "for all substantial purposes an accurate one", and "substantially correct", is filed in Vol. III of Item 7, as Doc. 46.

On August 20, 1957, petitioners filed their printed record and brief and appendix (Items 14, 15). In the latter,

p. 39, they stated that the stockholders' meeting scheduled for April 20, 1957 had been held that day.

The case was set for argument November 19, 1957. On that day petitioners filed their motion to adduce additional evidence, requesting the court, if it remanded the case to the SEC for further hearing, to turn over to the U. S. Department of Justice Exhibits 11 and 21 and that portion of the record covering Mr. McAfee's testimony, with the request that it appraise the same as regards "material perjury on the part of Mr. McAfee", and that it "submit its appraisal to respondent for use by petitioners at any hearing before respondent which may be held in conformity with such affirmative order of this court as may be entered on this motion" (Item 16).

The case was argued before Circuit Judges Sanborn and Van Oosterhout and District Judge Harper, and submitted that day (Item 17). At the argument Union moved to strike petitioners' aforesaid motion (Item 16). The SEC submitted its April 8, 1957 motion to dismiss (Item 5). None of the parties suggested mootness, nor did the court ask counsel to brief the mootness question, as did this court in *J. I. Case Co. v. Labor Board (1944), 321 U.S. 332, 334.* Instead, on January 24, 1958, sua sponte, it dismissed the petition for review "as having become moot" (Appendix B-2).

On February 12, 1958, petitioners filed their timely petition for rehearing (Item 20). Neither the SEC, nor Union, took any steps to advise the court that it considered the mootness ruling erroneous. On February 25, 1958, the petition for rehearing was denied (Item 21).

Then, on February 28, 1958, petitioners moved for stay of judgment (Item 22). Union's 1958 proxy proceedings before the SEC had already commenced. Annual stockholders' meetings are required under *R. S. Mo. 1949, Sec.*

351.225 (2), and under Union's By-Laws the 1958 meeting of its stockholders was scheduled for April 21, 1958. Union's management had already filed with the SEC its 1958 declaration, and petitioners had already filed their objections thereto. In those objections questions as to the validity of the SEC order of March 21, 1957, on which Union was relying, were raised. Petitioners contended to the SEC that it had no jurisdiction to exclude any of petitioners' proposals on the basis of that order, as Union proposed to do as regards three of them, including one that would outlaw the personal solicitation of legislators through means not addressed solely to their judgment to obtain the passage or defeat of legislation, and another that would rectify Union's illegal By-Law IX. The jurisdictional question was raised under Sec. 24 (a) of the Act, which petitioners contended gave the lower court "exclusive jurisdiction" over the March 21, 1957 SEC order until the judgment was handed down. Until then, petitioners contended, the court could vacate its judgment, or change it in any way it saw fit.

On March 6, 1958, the day the SEC hearing started, the SEC filed its response to petitioners' motion for 30 day stay of judgment. It took the position that petitioners' remedy lay in a petition for review of any 1958 SEC order entered, under which they might feel themselves aggrieved. In its response (Item 23) the SEC referred to the court's finding that the controversy was "obviously moot", and, by implication at least, approved the mootness decision.

Stay of judgment was denied March 12, 1958 (Item 25). A certified copy of the judgment was handed down March 14, 1958 (Item 26). See Appendix B-2.

PART III.[5]

In the meanwhile the SEC hearing of March 6-7, 1958, on Union's 1958 declaration of proxy material had been held, with petitioners present and participating (Item 27, Ex. B). The same issues were presented as had been presented at the 1957 SEC hearing, plus some others. This time oral argument was accorded petitioners, set for March 20, 1958.

On March 17, 1958, petitioner J. Raymond Dyer filed with the SEC his verified request (Item 34) that SEC Commissioners Orrick, Patterson, Hastings and Sargent disqualify themselves, or be disqualified, for bias and prejudice and favoritism, alleging (Item 34, p. 8) that he believed, and had just and reasonable cause to believe, that said Commissioners, "with bias and prejudice and favoritism as aforesaid, have shielded said material perjury of Union president J. Wesley McAfee, and will continue to shield it insofar as they are able." On March 18, 1958, the SEC denied that request (Item 35).

The SEC order of March 21, 1958 (Item 27, Ex. A), entered the day after the oral argument, as supplemented by the order of March 25, 1958 (Item 27, Ex. C), permitted Union's 1958 declaration to become effective. It sanctioned the proxy material of Union's management to be used in connection with the April 21, 1958, meeting of Union's stockholders. The SEC's March 21, 1958, Findings and Opinion (Item 27, Ex. B) followed the same course laid down in the April 17, 1957, Findings and Opinion (Pr. Rec. 26-41). The same type of proxy ballot was approved, and petitioners' same proposed false ad bans were excluded, this time both on the basis of Proxy Rule X-14A-8 (c) (5).

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[5] The record supporting Parts III and IV is the record in Case No. 15,989 below, filed here under Rule 23 (5) of this court. That record shows the recurring nature of the controversy.

In its March 21, 1957, order the SEC had declined to pass on the truth or falsity of Mr. McAfee's "report" on his $35,000 lobbying venture (Pr. Rec. 33), and had added: "The entire matter with respect to the $35,000 payment is now under investigation by us . . ." (Id.). But on August 9, 1957, it announced it had "discontinued its investigation" (Item 38).

The result of the U. S. Department of Justice investigation of Union's $35,000 lobby venture (Item 37) was that "the available evidence indicates a questionable transaction." Union had "purposely set in motion the chain of circumstances that they knew, or should have known, would accomplish that which, in fact, happened. Only the most naive persons could believe that Union Electric did not know that Hodge would end up with some of Browning's fee. That the exhaustive investigations disclose a devious course of conduct and engagement in transactions of questionable legitimacy by the company is beyond effective denial" (Item 37; see Pr. Rec. 106).

Such was the report which the Department of Justice issued May 24, 1957, and which it *"and the Securities and Exchange Commission"* approved for release to Mr. Dyer on August 19, 1957 (Item 37). That report scarcely substantiates Mr. McAfee's "report." The Globe editorial of November 17, 1956, based on the Exhibit 11 (Item 7, Doc. 41) version of Mr. McAfee's "report" (the truth of which editorial Mr. McAfee vouched for at the 1957 hearings [Item 7, Doc. 16, pp. 105, 110] and which he sent the stockholders [Item 7, Doc. 2] stating it "states the case clearly") states that Mr. McAfee had "taken what seems to be a completely honest course", and "had reached a high level of business statesmanship" (Item 7, Doc. 2).

In the **1958** proceedings before the SEC petitioners asked that subpoenas be issued so that they might prove the "falsity of the aforesaid testimony of Union's president

at the March 13, 1957, hearing" and the "falsity of Union's advertisements and communications to its stockholders" (Item 36). The SEC denied the subpoena request (Item 27, Ex. B, p. 17). It found (Id., p. 18) that "the accuracy of such testimony is not an issue herein", and, as regards the ads and communications, that "this material is too remote", and "is therefore not an issue in these proceedings" (Id., p. 17).

PART IV.

On April 4, 1958, petitioners filed with the court below, as Case No. 15,989, their verified petition to review the SEC orders of March 21 and 25, 1958 (Item 27), along with their verified application for a stay (Item 28). In the former they alleged, in paragraph 7, that "said SEC Findings and Opinion and Orders were entered as the result of bias and prejudice and partisanship on the part of the SEC."

Again Union intervened (Item 30), and again both the SEC and Union opposed the stay. But this time both contended that the mootness ruling in Case No. 15,765 was erroneous. See Items 29 and 31.

As stated heretofore, when petitioners' petition for rehearing in the instant case was pending, throughout the period February 12-25, 1958, neither counsel for the SEC, nor counsel for Union, advised the court below that he considered the mootness ruling erroneous. True, Rule 15 (c) of the court below recites that "no response to the petition (for rehearing) . . . will be allowed unless the court of its own motion, after the filing of the petition, otherwise directs". But "response" means "answer". Rule 15 (c) does not preclude the filing of a concurrence.

Under Rule 15 (a) of the court below the SEC could have filed its own petition for rehearing. Apart from that, no Rule, no law, no custom or practice, prevented counsel

for the SEC, once petitioners' petition for rehearing had been filed, from writing or telephoning the court, stating that he considered the mootness ruling erroneous and asking permission to file a memorandum in support of that belief. Indeed, counsel for the SEC could have done that any time before March 14, 1958, when the mootness judgment was handed down.

As it was, on March 6, 1958, in its response to petitioners' motion for stay of judgment in the instant case, the SEC approved the mootness ruling (Item 23). But on April 17, 1958, in response to petitioners' application for a stay in Case No. 15,989, it urged that it was erroneous (Item 29).

The stay sought in Case No. 15,989 was argued April 17, 1958 (Item 32), and denied the next day. In its April 18, 1958, order denying the stay the court (Circuit Judges Woodrough, Johnsen and Van Oosterhout) stated (Item 33):

> "Petitioners are, however, granted leave to brief and argue the question of mootness of the review, as related to our holding in No. 15,765, Dyer versus Securities and Exchange Commission, in connection with the hearing of this cause on its merits".

As to petitioners' brief under that order, under Eighth Circuit Rule 11 (a) it was due "40 days from the time of . . . filing of petition for review". That petition, as stated, was filed April 4, 1958, so the brief was due May 14. Because of this certiorari proceeding, and because mootness is jurisdictional under Art. III, Sec. 2, of the Constitution, petitioners asked for extension of time, pointing out that the SEC had not filed its record until April 21, 1958, and had filed a supplement thereto on April 28, 1958.

On May 6, 1958, just 8 days before petitioners' brief was due under said Rule 11 (a), the SEC opposed petitioners'

motion for extension of time. In its response to that motion, the SEC stated (Item 39, p. 2):

> "We submit that for the purpose of according petitioners additional time for the filing of their brief, no consideration should be given to the fact that petitioners may file a petition for writ of certiorari in No. 15,765, or to the pendency of such a petition even if it should be filed . . . It is our position that an extension of time for such a purpose is not warranted. There is no justification for delaying the present review on the basis of what petitioners may do in the other case."[6]

REASONS FOR GRANTING THE WRIT.

1. The mootness decision of the court below conflicts with the following Second and Fourth Circuit decisions: *Okin v. SEC (C.A. 2, 1944), 145 F. 2d 913, 914; SEC v. Okin (C.A. 2, 1943), 132 F. 2d 784, 789; In re Electric Power & Light Corp. (C.A. 2, 1949), 176 F. 2d 687, 689; Brown v. Eastern States Corp. (C.A. 4, 1950), 181 F. 2d 26, 30; South Carolina Public Service Authority v. FPC; Same v. SEC (C.A. 4, 1948), 170 F. 2d 948, 951.*

2. The mootness decision of the court below is irreconcilable with *The Chicago Junction Case (1924), 264 U.S. 258, 269-270.* It renders nugatory the provisions of Sec. 24 (a) of the Act, which accord to persons aggrieved the right to petition for review of SEC orders sanctioning proxy material. The judicial time lag will invariably outstrip the period between the entry of the SEC order and the stockholders' meeting.

3. A decision on the merits of this case is in the public interest. This is a class action, affecting a great public utility and all of its many thousands of stockholders. The lower court itself found that "a decision on the merits

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[6] Apparently mootness is a very flexible rule with the S.E.C., too.

might well be of much advantage to all parties concerned". See Appendix B-1.

4. If this mootness decision is allowed to stand no effective judicial review of any SEC order allowing proxy material to become effective will ever be possible in the Eighth Judicial Circuit, which embraces N. Dakota, S. Dakota, Minnesota, Iowa, Nebraska, Missouri and Arkansas. Under Sec. 24 (a) of the Act all stockholders residing in those states holding stock in any corporation will be obliged to seek judicial review before the U. S. Court of Appeals for the District of Columbia. A great number of people, throughout a very large area, have been adversely affected by this mootness decision.

5. There is lack of uniformity within the Eighth Circuit. The panel that passed on the stay application in Case No. 15,989, by according petitioners leave to brief and argue the mootness question therein, obviously did not follow the mootness decision herein, rendered by a different panel. The instant case should be remanded for hearing on the merits before all the Eighth Circuit Judges sitting en banc. *U.S. ex rel. Robinson v. Johnston (1942), 316 U.S. 649.*

6. The lower court misapplied the decisions dealing with political elections, cited in its opinion. A corporate election was involved here. Different principles govern. See *Aranow & Einhorn: Proxy Contests for Corporate Control (1957 Col. Univ. Press), pgs. 410-412, 422-426 and 444-476.* See *SEC v. Transamerica Corp. (DC Del. 1946), 67 F. Supp. 326 (C.A. 3, 1947), 163 F. 2d 511.*

7. A serious hinderance to the effective administration of the law has been set up by this mootness decision. The time-honored principle of judicial review of administrative decisions has been stymied behind this unjust, unreasonable and plainly wrong mootness decision, and a grave mis-

carriage of justice has resulted therefrom. The St. Louis Court of Appeals followed this mootness decision in *State ex rel. Dyer et al. v. Union Electric Co. et al., Case No. 29,859, ... S. W. 2d ....*, decided April 1, 1958, rehearing denied May 2, 1958. Unless the Supreme Court of Missouri accepts transfer of that case, and reverses it, the mootness decision herein will have set the law of Missouri. Unless this court accepts certiorari herein, and reverses this mootness decision, or unless the U. S. Court of Appeals for the Eighth Circuit overrules it in Case No. 15,989, the decision below will have set the law for that Circuit and for six other large and populous states.

8. Under Art. III, Sec. 2 of the Constitution mootness is a jurisdictional rule which precludes the rendering by federal courts of decisions in unreal controversies. It is not a rule that precludes decisions in real controversies, even though they may involve what the lower court found was "an acrimonious dispute." Cases otherwise moot may be rendered unmoot. See exceptions to the mootness rule listed in the index of Petition for Rehearing. However, acrimony is no exception to unmootness.

9. Tremendously important principles are involved in the instant case, demanding a decision on the merits. One of these is the issue of stockholder democracy versus management oligarchy. Not since *SEC v. Transamerica Corp. (C.A. 3, 1947, 163 F. 2d 511)* has a case so clearly, so basically presented that issue to a federal appellate court. There are some 8,000,000 stockholders in this country who hold stock in corporations over which the SEC has proxy jurisdiction. All will be vitally affected by the decision on the merits herein. All except management stockholders are adversely affected by the mootness decision below.

10. Another tremendously important issue presented in the instant case which demands decision on the merits is the issue of stockholder control versus SEC czarism. In

Missouri, as in most states, stockholders, not the SEC, have the ultimate control of their corporation. *R. S. Mo. 1949, Sec. 351.015 (6); Gregg v. Granby Mining & Smelting Co. (1901), 164 Mo. 616, 625, 65 S. W. 312, 313; Horwitz v. Balaban (S. D. N. Y. 1949), 112 F. Supp. 99, 101 (5).* Under the SEC order for which review is sought the SEC, without authority under any of the Acts it administers, has usurped that control. Congress gave the SEC no power to abridge state law.

11. By following *U. S. v. Hamburg-American Co. (1916), 239 U. S. 466,* the lower court followed a decision that has been distinguished almost out of existence by this court, and whittled down by many U. S. Court of Appeals decisions. See authorities cited in Petition for Rehearing, pp. 23 and 26. Controversies that recur annually are not moot. A judicial guide respecting its future conduct in proxy matters, and particularly its conduct in the 1958 Matter of Union's proxy declaration, was deprived the SEC. Such judicial guide, in the form of judicial restraint, is essential to the proper administration of proxy matters by the SEC. The deprivation thereof, accomplished by the mootness decision below, is detrimental to the national interest. Ours is a government of laws, not of men.

12. The controversy herein is not moot under *Mills v. Green (1895), 159 U.S. 651,* the parent case relied on by the court below. The April 20, 1957, stockholders' meeting, which the lower court considered as the intervening event causing mootness, was not held at the instance of petitioners, nor through the exercise of any power beyond the control of any of the parties. The meeting was held at the instance of Union, after becoming a party on April 8, 1957. Hence, the holding of that meeting did not render the controversy moot. See authorities cited in Petition for Rehearing, pgs. 24, 25.

13. Unless the writ requested be granted and the decision below be reversed, no restraint on the kind of false advertising and false communications to stockholders engaged in by Union's management is possible. Sec. 45 (a) of the Federal Trade Commission Act does not cover it, according to the Commission administering that Act. Besides, that Act imposes no penalty. *R. S. Mo. 1949, Sec. 561.660,* the Missouri false ad statute, does not cover it, according to *State v. Carruthers, supra.* The Federal Lobbying Act was held by this court in *U. S. v. Rumely (1953), 345 U.S. 41,* not to cover attempts "to saturate the thinking of the community." Indeed, any federal legislation attempting to do so would probably be held unconstitutional. *Near v. Minnesota (1931), 283 U.S. 697.* And the SEC, in abuse of its discretion, and by unlawful usurpation of authority, has held By-Laws and resolutions banning false ads and false communications to stockholders improper for stockholder action under Proxy Rule X-14A-8 (c) (5).

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted. If granted, and this court does not reverse and remand without briefs or argument, petitioners pray that the hearing before this court be held on the record as submitted herewith, without need to print. That privilege was accorded petitioners below (Item 13). No record is really needed to review the mootness decision herein.

Respectfully submitted,

J. RAYMOND DYER,

Attorney for Petitioners.

APPENDIX A.

1. Statute Involved.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

Court Review of Orders.

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission

and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

2. **Administrative Order Involved.**

The SEC order of March 21, 1957, the review of which was sought below, is set forth in the Printed Record, pp. 42-44.

APPENDIX B.

1. Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,765.

Nancy Corinne Dyer and J. Raymond Dyer, Petitioners, vs. Securities and Exchange Commission, Respondent, Union Electric Company, a corporation, Intervenor-Respondent.	Petition to Review Decision of Securities and Exchange Commission.

[January 24, 1958.]

J Raymond Dyer (Nancy Corinne Dyer, as a petitioner, was with him on the brief) for Petitioners.

Daniel J. McCauley, Jr., Associate General Counsel, Securities and Exchange Commission (Thomas G. Meeker, General Counsel, Aaron Levy, Special Counsel, and Joseph S. Mitchell, Jr., Attorney, Securities and Exchange Commission, were with him on the brief) for Respondent.

Robert J. Keefe (William H. Ferrell, Keefe, Doerner, Schlafly & Griesedieck, and J. M. Lashly were with him on the brief) for Intervenor-Respondent.

Before SANBORN and VAN OOSTERHOUT, Circuit Judges, and HARPER, District Judge.

SANBORN, Circuit Judge.

This case comes before us on a petition to review an order of the Securities and Exchange Commission, entitled "Order Permitting Declaration to become effective Regarding Solicitation of Proxies," entered March 21, 1957, in the Matter of Union Electric Company, File No. 68-167, a proceeding before the Commission having to do with a declaration of that Company for the solicitation of proxies from its stockholders for use at its annual stockholders' meeting scheduled to be held April 20, 1957.

The petition to review was filed under 15 U.S.C. § 79x by Nancy Corinne Dyer and her father, J. Raymond Dyer, each of whom is a stockholder of the Union Electric Company, a Missouri corporation and a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. §§ 79a et seq. The Company's offices are in St. Louis, Missouri, where the petitioners reside.

It is provided by § 79x (a): (1) that a person aggrieved by an order of the Commission, such as is here in question, may obtain a review of it by a United States Court of Appeals by filing and serving a petition praying that the order be modified or set aside in whole or in part; (2) that the Commission shall thereupon certify and file in the court a transcript of the record upon which the order complained of was entered; (3) that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive; and (4) that "The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28" U.S.C. Subsection (b) of § 79x provides: "The commencement of proceedings under subsection (a) of this section shall not, un-

less specifically ordered by the court, operate as a stay of the Commission's order."

The petitioners, at the time they filed in this Court their petition for review of the Commission's order of March 21, 1957, also filed an application for a stay of the order. The application for a stay was argued on April 8, 1957, and was denied the following day.

The declaration which, by the order of the Commission, the Company was permitted and was authorized to use in the solicitation of proxies was used by the Company in the obtaining of proxies for its annual stockholders' meeting of April 20, 1957, the meeting was held pursuant to notice, the proxies were voted, directors were elected for the ensuing year, and other business was transacted.

If it be assumed that the order of the Commission permitting the Company to use the declaration which it did use in soliciting proxies for its April 20, 1957, meeting, was, as petitioners claim, invalid when entered and subject to being modified or set aside by this Court, in whole or in part, we cannot see that any judgment or decree which we might now enter in that regard could have any practical effect. The sole purpose of the proceeding before the Commission was to prevent the Company from soliciting proxies for the annual stockholders' meeting to be held on April 20, 1957, by the use of a declaration, proxy statement and proxy form, to which the petitioners had vigorously objected because of the omission of certain proposals submitted to the Company by petitioners in the form of resolutions or amendments to its by-laws to be voted upon at the stockholders' meeting of April 20, 1957.

When it appears in an action or proceeding that the thing sought to be prevented has been done and cannot be undone by any order of the court, the case is moot. *Jones* v. *Montague*, 194 U.S. 147, 153.

The duty of a court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. Green, 159 U.S. 651, 653. See also and compare, *California* v. *San Pablo and Tulare Railroad Co.*, 149 U.S. 308, 313-314; *Richardson* v. *McChesney*, 218 U.S. 487, 492; *Stearns* v. *Wood*, 236 U.S. 75; *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 475-476; *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 115-116; *Industrial Development Co. of Little Rock v. Thompson*, 8 Cir., 231 F.2d 825, 828-829 and cases cited.

The fact that a decision in a moot case will establish a rule for controlling predicted future conduct does not give the court any authority to decide it on the merits, and "No stipulation of the parties or counsel * * * can enlarge the power, or affect the duty, of the court in this regard." *United States* v. *Hamburg-American Co.*, supra, pages 475-476 of 239 U.S.; *United States v. Alaska Steamship Co.*, supra, page 116 of 253 U.S.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Association of St. R. Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418.

Neither the Commission nor the Union Electric Company has raised any objection to our deciding this case upon the merits. In their briefs and arguments they have treated it as still a live and subsisting controversy. A decision on the merits might well be of much advantage to all parties concerned, and perhaps would tend toward putting an end to an acrimonious dispute. However, it seems so obvious to us that the controversy is moot and the ques-

tions argued purely academic that we must refrain from expressing any opinion about them.

Since the order of the Commission with respect to the form and contents of the Company's declaration for the solicitation of proxies for the April 20, 1957, annual meeting of its stockholders is not res judicata and will not tie the Commission's hands in the future, our conclusion is that the petition to review should be dismissed for mootness, without requiring a vacation of the Commission's order of March 21, 1957, in order "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." See, *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41, and *Industrial Development Co. of Little Rock* v. *Thompson*, supra, page 829 of 231 F.2d.

The petition to review is dismissed as having become moot.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

2. Judgment Below.

As certified by Eugene C. Fisher, Acting Clerk, on March 14, 1958, and mailed to the parties that date:

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15765—September Term, 1957.

Nancy Corinne Dyer and J. Raymond Dyer, Petitioners, vs. Securities and Exchange Commission, Respondent, Union Electric Company, a Corporation, Intervenor-Respondent.	Petition to Review Decision of Securities and Exchange Commission.

This cause came on to be heard on the petition of petitioners to review an order of the Securities and Exchange Commission, entitled "Order Permitting Declaration to become effective Regarding Solicitation of Proxies," entered March 21, 1957, in the Matter of Union Electric Company, File No. 68-167, transcript of record from the Securities and Exchange Commission, printed record and supplemental record of petitioners, motion of petitioners to adduce additional evidence, and motion of respondent to dismiss the petition to review, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the petition to review order of the Securities and Exchange Commission entered on March 21, 1957, in this cause, be, and the same is hereby, dismissed as having become moot, in accordance with opinion of this Court this day filed herein.

January 24, 1958.